Four Indian Supreme Court Judges Accuse the Chief Justice of Wrongdoing

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Adeel Hussain Do 18 Jan 2018 Do 18 Jan 2018

'The administration of the court is not in order!', fumed Jasti Chelameswar of the Indian Supreme Court on 12 January, 2018, from the lawn of his luxuriant Lutyen's bungalow, where the occasional peacock gawked confused at the intrusion of loud-mouthed reporters into Delhi's innermost power sanctum. The new year started with a bang. 'We owe a responsibility to the institution and to the nation. We are not running politics!', Jasti Chelameswar assured the huddled crowds before distributing a letter he had written to the chief justice of India, Dipak Misra.

The letter was co-signed by three fellow judges of the Supreme Court, who, dressed in conventional garden party attire, were seated next to Chelameswar during the press conference. While carefully worded, the letter came straight to the point: after lamenting Dipak Misra's repeated neglect to perform his tasks satisfactorily, the four judges-turned-mutineers alleged that the chief justice had systematically misused his key duty to allocate incoming cases to their destined benches. This violation of established procedural norms warranted the fabulous four to drag this issue straight into the agora; an unprecedented move that left a number of liberal commentators wondering if India's independent judiciary may have taken an irrevocable hit, perhaps second only to 'the emergency', shorthand for Indira Gandhi's swift folding up of the court's operation in the mid-70s.

German jurisprudence can breathe out. When German jurists ultimately grew tired of Friedrich Carl von Savigny's spirited war-mongering against the codification of laws in the nineteenth century, they frenzied straight into a legislation bonanza. A totemic legal code emerged, where the law was omnipotent and whispered to have the power to pre-emptively resolve all legal disputes. This was nineteenth century intellectual confidence in full play. If real-life incidents conjured up a legal challenge impossible to subsume under this all-knowing legal organism – say, the need for specific traffic legislation to regulate increased presence of cars in the early twentieth century – befuddled jurist gazed towards the legislature in the hope it would cough up new laws to magically disentangle their legal tribulations. The two wars had little effect on this legislation on steroids, with German jurists impatient for a quick-fix to keep their legal game tight.

The German supreme court is no exception to this general trend. If we look at the ways in which the *Bundesverfassungsgericht* allocates incoming cases today, a predictably boring procedure termed with an equally dry German compound word (*Geschäftsverteilungsplan*, for those who are into this), we find a well-ordered legal mechanism: cases are assigned to benches along two broad subjects and then distributed using a strictly numeric algorithm (§14 BVerfGG). The kind of legal job that will be captured by robots in a few years, as Silicon Valley prophets tell us euphorically. If the president of the Verfassungsgericht, in a

very quiet moment, fantasies about changing this set-in-stone procedure, he better be prepared to rock up with an entire wolfpack of fellow judges (he needs six; for the purposes of this essay it is assumed that six is also the numbers of conventional wolfpacks).

Savigny's war-paint to keep rampant legislation at bay was a plea to German lawyers to think creatively about fresh interpretations to Roman Law. Savigny viewed Roman Law as a universal backdrop to dialogically strike new conversations with a free-floating spirit, named *Volksgeist* (yes, Hegel!). Cynics today would probably describe Savigny's scientific method as a cocktail of medieval fortune telling with a splash of enlightenment astrology. But this, however hazy, legal landscape was missing in India. India had a few religious rule books that learned Orientalists, proud Swamis, and state-sponsored Mullahs alike swore by, but India never had a truly Justinian moment from which to extrapolate any comprehensive legal grammar. The default backdrop in India always looked more like Hobbesian anarchy.

The hostility towards unified codification of legal norms is not always a sign of a nation's vitality. *Volksgeist* may well produce fresh impulses to legitimise and shape new legal standards. But non-codification can also simply be a testament for terrible organisation, or, dare I say, non-existence of *Volksgeist*. Not many people have been able to speak to him since Hegel.

Instead of empirically discerning legal norms from Indian society, the colonial state perpetually lagged three steps behind. Indian social and political movements had to manufacture a deafening amount of noise to acquire thin carpaccio slices of legal recognition. Their go-to method in the twentieth century was the performance of violent spectacles to find refuge under the state's legal umbrella (burning is still particularly hip, as anthropologist who study this stuff have pointed out). An example of this would be the Muslim rampage in the 1920s to push through blasphemy legislation, or, on a much greater scale, the Indian independence movement of the 1940s itself.

Even Gandhi's inexhaustible superpower to absorb violence fell dramatically short in preventing the indiscriminate slaughter of millions during the birthing hour of the Indian Republic and Pakistan in 1947. If you want to make legal change happen in India the easiest way is to create ruckus, while keeping a social reform plan or a political agenda in hand at all times.

Homo homini homo. Let's assume for a minute that the Indian judges felt morally obliged to publicise their discomfort with the chief justice's blatant disregard for procedural rules and his insinuated arrangement of amenable benches, apparently favouring the government in politically charged cases. As the four judges stressed during the press conference: in their self-understanding, they had 'simply discharged their debt to the nation'.

But this act of exposing the institution feels more Julian Assange than Edward Snowden. While Snowden nobly enacted his civil disobedience through carefully weighing the potential damage to individuals and institutions that his revelation may usher in, Assange was more into spilling everything out at once, in utter disregard of the sacred Anglo-Saxon cost-benefit analysis, while making sure all eyes remained sharply focused on his persona. The judges should have been more considerate towards the institutional damage their actions have caused. They have hurt the court for decades to come and the words of Ernst

Cassirer will ring true, that politics dwells on volcanic soil. Institutional reform proves healthy when it comes from the inside; and one would like to think, that four senior judges wield a hefty amount of institutional power to transform the procedural mechanism without having to ‘call upon the people’ to intervene.

Homo homini lupus. This was little more than a political act in a country where politics and the law only function along the simple logic of institutionalising antagonism. The ascent of Arvind Kejriwal in Delhi and Modi at the national stage has further spurred India’s appetite for authoritarian strong-men. Muscular supreme court judges also want their voices heard. After all, since when is it wrong to appeal to the nation as the true legitimating force of legislative renewal? The positive (written) constitution only forms a fragment of the wider constitutional order that in democracies resides within the people. Used in moderation, the judges could rightly hope that rocking the institutional boat just a little, carried the promise of smoothly changing the procedure code; a code, where the chief justice now squarely occupies the title ‘master of the roster’ and can slot cases as he sees fit.

It remains to be seen, how and if the much-praised institution will regain its lost honour. For now, the business-as-usual performance of the mutineers makes them come across more like cunning foxes than honest wolves.

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